United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

ORIGINAL

75-2042

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United States Court of Appeals

For the Second Circuit.

STANLEY ROTHSCHILD,
Plaintiff-Appellant,

STATE OF NEW YORK, COMMISSIONER OF CORRECTIONAL SERVICES, HONORABLE GEORGE ROBERTS, Acting Justice of the Supreme Court of the State of New York, New York County,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Supplemental Brief for Plaintiff-Appellant.

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* Reproduced in full in addendum.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2042

STANLEY ROTHSCHILD,

Plaintiff-Appellant,

-vs.

STATE OF NEW YORK, COMMISSIONER OF CORRECTIONAL SERVICES, HONORABLE GEORGE ROBERTS, Acting Justice of the Supreme Court of the State of New York, New York County,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR PLAINTIFF-APPELLANT ROTHSCHILD

Statement

This supplemental brief is submitted by leave of the Court to consider the effect on the decision in the case at bar of the decision of the Supreme Court of the United States, rendered June 23, 1975 in United States v. Hale, as reported in The United States Law Week of June 24, 1975 (43 LW 4806)*.

* For the convenience of the Court a copy of the case as reported is annexed as an addendum to this brief.

By its decision in Hale, the Supreme Court affirmed an order of the Court of Appeals for the District of Columbia Circuit which, inter alia, reversed a judgment of the District Court for the District of Columbia convicting Hale of robbery (498 F. 2d 1038). The reversal by the Court of Appeals was based upon the fact that during cross-examination at trial the prosecutor had asked Hale why he had not given the police his alibi when he was questioned shortly after his arrest. The Court of Appeals (with Wilkey C.J. dissenting) held that, although the trial court instructed the jury to disregard this colloquy but refused to declare a mistrial, the inquiry into Hale's prior silence impermissibly prejudiced his defense and infringed upon his right to remain silent under Miranda v. Arizona, 384 U.S. 436, 468 n. 37 (1966).

The Supreme Court had granted certiorari "because of a conflict among the courts of appeals over whether a defendant can be cross-examined about his silence during police interrogation and because of the importance of this question to the administration of justice." In announcing the Court's opinion, Mr. Justice Marshall, writing for the majority, stated as follows:

> "We find that the probative value of respondent's pre-trial silence in this case was outweighed by the prejudicial impact of

admitting it into evidence. Affirming the judgment on this ground, we have no occasion to reach the broader constitutional question that supplied an alternative basis for the decision below."

Mr. Justice Blackmun concurred in the result without opinion and Chief Justice Burger and Justices Douglas and White concurred in the judgment with separate opinions. Justice Douglas in his opinion stated that he was opposed to the Court's resting its conclusion "on the special circumstances of this case" because he could think "of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it." (citing his concurring opinion in Grunewald v. United States, 353 U.S. 391, 425 (1957)). Justice Douglas further stated:

"I do not accept the idea that Miranda loses its force in the impeachment context. See Harris v. New York, 401 U.S. 222 (1971). In my opinion Miranda should be given full effect."

Justice White in his concurring opinion said this:

"...when a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an

unfavorable inference might be drawn as to the truth of his trial testimony. Cf. Johnson v. United States, 318 U.S. 189, 196-199 (1943)."

The Constitutional Question

Although in Hale it was not necessary for the Court to reach the constitutional question because the appeal was from a judgment of conviction in a Federal court, this Court cannot avoid that issue because here what is involved is whether the appellant's state court trial violated the Fifth and Fourteenth Amendments of the United States Constitution. As the Supreme Court in Hale did not hold that the question of the admissibility of post-arrest silence is not violative of any constitutional provision, this Court is free to follow its own previous holding that cross-examination along such lines is "clearly violat[ive of] the defendant's Fifth Amendment right to remain silent." (United States v. Semensohn, 421 F. 2d 1206, 1210 (2d Cir. 1970). Moreover, for the reasons stated in the opinions of Justices Douglas and White, such holding is consonant with the holding of the Supreme Court in Miranda v. Arizona, supra at page 468, n. 37.

The Question of Inconsistency

In his opinion, Justice Marshall stated as follows:

"A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent. 3A J. Wigmore, Evidence §1040 (Chadbourn rev. 1970). If the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded.

Justice Marshall then went on to state in his opinion that, "In most circumstances silence is so ambiguous that it is of little probative force ." And he further stated as follows:

"...Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question. 3A J. Wigmore, Evidence §1042 (Chadbourn rev. 1970)..."

In holding that Hale's silence was not inconsistent, Justice Marshall said this:

"Respondent, for example, ha just been given the Miranda warnings and was particularly aware of his right to remain silent and the fact that anything he said could be used against him. Under these circumstances, his failure to offer an explanation during the custodial interrogation can as easily be taken to indicate

reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication. There is simply nothing to indicate which interpretation is more probably correct."

It is submitted that the undisputed facts in the case at bar demonstrate even more clearly than in Hale that this appellant's post-arrest silence was not inconsistent with his trial testimony or his protestations of innocense. In Hale, the defendant was questioned by the police shortly after his arrest and was given the opportunity to assert the alibi to which he later testified in his own defense at his trial. The appellant here, however, was not questioned by the police at the time of his arrest nor was he then asked to explain his conduct. The Court's attention is called to page A514 in the record on appeal in which Rothschild was asked on cross examination the following questions and made the following answers:

"Q. And you were the one to set the figure when he offered to pay you money on December 10th?

A. I said if (sic) for a reason.

Q. You haven't articulated to us the reason. Let me ask you this sir, at any time in the past since the time you were arrested, did you ever tell any member of the police department the reason?

A. Nobody asked!"

It is respectfully submitted that Judge Werker in the Court below was correct in finding that, contrary to the holding in the New York State Court of Appeals, appellant's post-arrest silence was not inconsistent with his trial testimony. In arriving at that conclusion, Judge Werker in his opinion said this (10a):

> "The court appears to have based its conclusion that Rothschild was under a 'patent obligation to speak' on the fact that he was a policeman. While he may indeed have had such an obligation prior to his arrest, this court fails to understand how he could have remained under that obligation after his arrest, when he was immediately suspended [7] from the force and placed in a classic custodial position vis-a-vis his former colleagues.[8] Having served as a police officer he surely knew his Miranda warnings, and like any other suspect in police custody, he was entitled to rely on his privilege not to discuss the alleged violations with his captors. Miranda v. Arizona, 384 U.S. 436 (1966). Since he was relieved of police duties and obligations upon his arrest and immediate suspension, his silence at that time does not appear to this court patently inconsistent with the defense asserted at trial."

---

7. "Proper discipline of the police force demands a power of immediate suspension even before specific charges are formulated and served." Brenner v. City of New York, 9 A.D. 2d 729, 192 N.Y.S. 2d 449 (1st Dept. 1959)."

8. "The Court of Appeals has previously held that suspension of a New York City policeman "implies that the official is relieved of duty during the interval," and does not continue to perform his services on the force. Brenner v. City of New York, 9 N.Y. 2d 447, 214 N.Y.S. 2d 444, 446 (1961). See also Gould v. Looney, 304 N.Y.S. 2d 537, 542 (S. Ct. Nassau 1969). If a policeman on suspension is relieved of all police duties is he not also relieved of police "obligations?"

The "Harmless Error" Question

In holding that "it was prejudicial error for the trial court to permit cross-examination of respondent concerning his silence during police interrogation", Mr. Justice Marshall, in his opinion in Hale, stated as follows:

> "Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.'
>
> As we have stated before: "Where the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." Shepherd v. United States, 290 U.S. 96, 104 (1930). We now conclude that the respondent's silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact." (emphasis supplied)

It is important to note that the Court held in Hale that reference to the defendant's silence had an "intolerably prejudicial impact" even though the trial judge sua sponte immediately said to the jury "He (the defendant) is not required to indicate where the money came from. There is no responsibility on his part in regard to that." And he further "indicated to the

jury that it is clearly an inappropriate question. You may disregard it, ladies and gentlemen. The defendant is not required to give any explanation whatsoever at the time of his arrest." In the case at bar, however, the trial judge overruled the objections of appellant's counsel to the disputed questions, thus indicating to the jury that the questions were relevant and proper. Thus, the prejudicial impact of the improper question was greater here than it was in Hale.

In Hale, since the disputed questions were ruled improper by the trial judge, there was no reference to that testimony in the government's summation, whereas in the case at bar, in an obvious reference to the appellant's post-arrest silence, the prosecutor said in his summation as follows (A596-A597):

> "...Why didn't he tell any of his superior officers about this? I don't think I even have to go into this, for it is so ludicrous. If he was going to make a case against this desperado, isn't he going to tell the District Attorney's office, or his commanding officer. Isn't that just common sense?" [Emphasis supplied]

In Hale, the defendant's failure to reveal his alibi at the time of his arrest would have had a prejudicial impact on the jury. It is submitted, however, that the failure of a police officer to reveal his alibi after his arrest would have an even greater prejudicial impact on the jury. A jury of laymen would undoubtedly believe, as the Court of Appeals of the

State of New York believed, that "the natural consequences of (the defendant's) status as a law enforcement officer would require him to promptly report any bribe or attempted bribe to his superiors, and certainly protest and reveal such an alleged scheme after his arrest to them, and to his fellow officers as well." (Emphasis supplied) Thus, the prejudicial impact of the questions and answers put to this appellant were greater than the prejudicial impact in Hale which the Supreme Court held was intolerable and required reversal.

The disputed questions in Hale were almost innocuous when compared with the questions put to the appellant in the case at bar. Here, the appellant was asked not only as to his failure to reveal his defense directly after his arrest, but he was also asked the following question and made the following answer (27a-28a):

> "Q. In the last twenty-eight months, did you ever tell anybody in the Police Department ranking police officers, that you have got me all wrong, I was just trying to get this drug peddler and lock him up on a charge of bribery, did you ever tell that to anybody?
>
> MR. HERWITZ: I object.
>
> THE COURT: Overruled.
>
> A. No, sir."

In Hale it was held that prejudicial error had been committed even though, as pointed out by Judge Wilkey in his

dissenting opinion in the Court of Appeals, "... the comment on the defendant's silence before the police was not extensive; no inference of guilt was stressed to the jury; and a cautionary instruction was given." (498 F. 2d at 1054) In the case at bar, the comment on the defendant's silence was more extensive than it was in Hale; the inference of guilt was stressed to the jury; and no cautionary instruction was given.

As to the claim that the proof of appellant's guilt was "overwhelming", this Court is again referred to pages 38a to 52a of appellant's appendix in this Court wherein that contention is refuted on the basis of the evidence in the record on appeal.

For the reasons stated therein as well as for those stated above, it is respectfully submitted that just as in Hale, it was prejudicial error requiring reversal of the judgment of conviction for the trial court to permit cross-examination of appellant concerning his failure to reveal his defense to his superior officers after his arrest and suspension. It is further submitted that the error was of constitutional proportions and violated the Fifth and Fourteenth amendments of the United States Constitution.

C O N C L U S I O N

THE HOLDING OF THE SUPREME COURT IN HALE, SUPPORTS AND IS CONSISTENT WITH APPELLANT'S CONTENTION THAT THE ORDER DENYING THE APPLICATION FOR A WRIT OF HABEAS CORPUS SHOULD BE REVERSED

Victor J. Herwitz

Respectfully submitted,

VICTOR J. HERWITZ
Attorney for plaintiff-appellant
Rothschild

(Michael Kopcsak, Esq. with him on the Brief.)

SUPPLEMENTAL ADDENDUM

43 LW 4806 *The United States* LAW WEEK 6-24-75

Full Text of Opinions

No. 74-364

United States, Petitioner, v. William G. Hale. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 23, 1975]

Syllabus

Following respondent's arrest for robbery he was taken to the police station, where, advised of his right to remain silent, he made no response to an officer's inquiry as to the source of money found on his person. Respondent testified at his trial and, in an effort to impeach his alibi, the prosecutor caused respondent to admit on cross-examination that he had not offered the exculpatory information to the police at the time of his arrest. The trial court instructed the jury to disregard the colloquy but refused to declare a mistrial. Respondent was convicted. The Court of Appeals reversed, holding that inquiry into respondent's prior silence impermissibly prejudiced his defense as well as infringed upon his constitutional right to remain silent under *Miranda* v. *Arizona*, 384 U. S. 436. The Government, relying on *Raffel* v. *United States*, 271 U. S. 494, contends that since respondent chose to testify in his own behalf, it was permissible to impeach his credibility by proving that he had chosen to remain silent at the time of his arrest. *Held:* Respondent's silence during police interrogation lacked significant probative value and under these circumstances any reference to his silence carried with it an intolerably prejudicial impact. This Court, exercising its supervisory authority over the lower federal courts, therefore concludes that respondent is entitled to a new trial.

(a) Under the circumstances of this case the failure of respondent, who had just been given the *Miranda* warnings, to respond during custodial interrogation to inquiry about the money can as easily connote reliance on the right to remain silent as to support an inference that his trial testimony was a later fabrication. *Raffel* v. *United States*, *supra*, distinguished.

(b) Respondent's prior silence was not so clearly inconsistent with his trial testimony as to warrant admission into evidence of that silence as a prior inconsistent "statement," as is manifested by the facts that (1) respondent had repeatedly asserted innocence during the proceedings; (2) he was being questioned in secretive surroundings with no one but the police also present; and (3) as the target of eye-witness identification, he was clearly a "potential defendant." *Grunewald* v. *United States*, 353 U. S. 391, followed.

(c) Admission of evidence of silence at the time of arrest has a significant potential for prejudice in that the jury may assign much more weight to the defendant's previous silence than is warranted.

— U. S. App. D. C. —, 498 F. 2d 1038, affirmed

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., and DOUGLAS and WHITE, JJ., filed opinions concurring in the judgment. BLACKMUN, J., concurred in the result.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Respondent was tried and convicted of robbery in the District Court for the District of Columbia.[1] During cross-examination at trial the prosecutor asked respondent why he had not given the police his alibi when he was questioned shortly after his arrest. The trial court instructed the jury to disregard the colloquy but refused to declare a mistrial. The Court of Appeals for the District of Columbia Circuit reversed, holding that inquiry into respondent's prior silence impermissibly prejudiced his defense and infringed upon his right to remain silent under *Miranda* v. *Arizona*, 384 U. S. 436, 468 n. 37 (1936). We granted certiorari, 410 U. S. 1045, because of a conflict among the courts of appeals over whether a defendant can be cross-examined about his silence during police interrogation,[2] and because of the importance of this question to the administration of justice.

We find that the probative value of respondent's pretrial silence in this case was outweighed by the prejudicial impact of admitting it into evidence. Affirming the judgment on this ground, we have no occasion to reach the broader constitutional question that supplied an alternative basis for the decision below.

I

On June 1, 1971, Lonnie Arrington reported to police that he had been attacked and robbed by a group of five men. Initially, he claimed that $65 had been stolen, but he later changed the amount to $96 after consulting with his wife. As the police were preparing to accompany Arrington through the neighborhood in search of the attackers, he observed two men and identified one of them as one of his assailants. When the police gave chase, the two men fled but one was immediately captured. The victim identified respondent Hale as one of the robbers.

Respondent was then arrested, taken to the police station and advised of his right to remain silent. He was searched and found to be in possession of $158 in cash. An officer then asked, "Where did you get the money?" Hale made no response.

At trial respondent took the witness stand in his own defense. He acknowledged having met Arrington in a shoe store on the day in question. Hale stated that, after the meeting, he was approached by three men who inquired whether Arrington had any money, to which Hale replied he "didn't know." From there respondent

[1] Respondent was tried in federal district court prior to the effective date for the transfer of jurisdiction over D. C. Code offenses under the District of Columbia Court Reorganization and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

[2] Compare *United States* v. *Semensohn*, 421 F. 2d 1206, 1209 (CA2 1970); *United States* v. *Brinson*, 411 F. 2d 1057, 1060 (CA3 1969); *Fowle* v. *United States*, 410 F. 2d 48 (CA9 1969); and *Johnson* v. *Patterson*, 475 F. 2d 1066 (CA10), cert. denied, 414 U. S. 878 (1973), with *United States ex rel. Burt* v. *New Jersey*, 475 F. 2d 234 (CA3), cert. denied, 414 U. S. 973 (1973); and *United States* v. *Ramirez*, 441 F. 2d 950, 954 (CA5), cert. denied, 414 U. S. 869 (1971).

claimed he went to a narcotics treatment center, where he remained until after the time of the robbery. According to his testimony he left the center with a friend who subsequently purchased narcotics. Shortly after the transaction they were approached by the police. Hale testified that he fled because he feared being found in the presence of a person carrying narcotics. He also insisted that his estranged wife had received her welfare check on that day and had given him approximately $150 to purchase some money orders for her as he had done on several prior occasions.

In an effort to impeach Hale's explanation of his possession of the money, the prosecutor caused Hale to admit on cross-examination that he had not offered the exculpatory information to the police at the time of his arrest:

> "Q. Did you in any way indicate [to the police] where the money came from?
> "A. No, I didn't.
> "Q. Why not?
> "A. I didn't feel it was necessary at the time."

The Government takes the position that since the respondent chose to testify in his own behalf, it was permissible to impeach his credibility by proving that he had chosen to remain silent at the time of his arrest.[3] For this proposition the Government relies heavily on this Court's decision in *Raffel* v. *United States*, 271 U. S. 494 (1926).[4] There, a second trial was required when the first jury failed to reach a verdict. In reliance on his privilege against compulsory self-incrimination, the accused declined to testify at his first trial. At the second trial, however, he took the stand in an effort to refute the testimony of a government witness. Over objection, Raffel admitted that he had remained silent in the face of the same testimony at the earlier proceeding. Under these circumstances the Court concluded that Raffel's silence at the first trial was inconsistent with his testimony at the second, and that his silence could be used to impeach the credibility of his later representations. The Government argues that silence during police interrogation is similarly probative and should therefore be admissible for impeachment purposes.

We cannot agree. The assumption of inconsistency underlying *Raffel* is absent here. Rather, we find the circumstances of this case closely parallel to those in *Grunewald* v. *United States*, 353 U. S. 391 (1957), and we conclude that the principles of that decision compel affirmance here.

[3] Immediately following the exchange, the court cautioned the jury that the questioning was improper and that they were to disregard it. The Court of Appeals held that the error was not cured by this instruction and the Government does not contend in this Court that the error was harmless.

[4] Since we do not reach the constitutional claim raised today, we need not decide whether the *Raffel* decision has survived *Johnson* v. *United States*, 318 U. S. 184 (1943), and *Griffin* v. *California*, 380 U. S. 609 (1965). See *Grunewald*, *supra*, 353 U. S., at 425-426 (Black, J., concurring).

II

A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent. 3A J. Wigmore, Evidence § 1040 (Chadbourn rev. 1970). If the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded.

In most circumstances silence is so ambiguous that it is of little probative force. For example, silence is commonly thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others. See 4 J. Wigmore, Evidence § 1071 (Chadbourn rev. 1972). Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question. 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970). The *Raffel* Court found that the circumstances of the earlier confrontation naturally called for a reply. Accordingly, the Court held that the prior silence of the accused was admissible. But the situation of an arrestee is very different, for he is under no duty to speak and, as in this case, has ordinarily been advised by government authorities only moments earlier that he has a right to remain silent, and that anything he does say can and will be used against him in court.

At the time of arrest and during custodial interrogation, innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. See Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 627, 676 (1966). He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention. In sum, the inherent pressures of in-custody interrogation exceed those of questioning before a grand jury and compound the difficulty of identifying the reason for silence.[5]

Respondent, for example, had just been given the *Miranda* warnings and was particularly aware of his right to remain silent and the fact that anything he said could

[5] See Kamisar, Kauper's "Judicial Examination of the Accused" Forty Years Later—Some comments on a Remarkable Article, 73 Mich. L. Rev. 15, 34 n. 70 (1974).

be used against him. Under these circumstances, his failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication. There is simply nothing to indicate which interpretation is more probably correct.

III

One analysis of the probative value of silence before police interrogators is similar to that employed in *Grunewald v. United States*, *supra*. In that case a witness before a grand jury investigating corruption in the Internal Revenue Service declined to answer a series of questions on the ground that the answers might tend to incriminate him. The witness, Max Halperin, was later indicted for conspiracy to defraud the United States. At trial he took the stand to testify in his own defense, and there responded to the same questions in a manner consistent with innocence. On cross-examination the prosecutor elicited, for purposes of impeachment, testimony concerning the defendant's earlier invocation of the Fifth Amendment on the same subject matter. The Court framed the issue of Halperin's prior silence as an evidentiary problem and concluded that the circumstances surrounding Halperin's appearance before the grand jury justified his reliance on the Fifth Amendment, imposed no mandate to speak, and presented valid reasons, other than culpability, for deferring comment. The Court ruled that Halperin's prior silence was not so clearly inconsistent with his later testimony as to justify its admission as a prior inconsistent "statement."

In *Grunewald* the Court identified three factors relevant to determining whether silence was inconsistent with later exculpatory testimony: (1) repeated assertions of innocence before the grand jury; (2) the secretive nature of the tribunal in which the initial questioning occurred;[6] and (3) the focus on petitioner as potential defendant at the time of the arrest, making it "natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself." 353 U.S., at 422–423.

Applying these factors here, it appears that this case is an even stronger one for exclusion of the evidence than *Grunewald*. First, the record reveals respondent's repeated assertions of innocence during the proceedings; there is nothing in the record of respondent's testimony inconsistent with his claim of innocence. Second, the forum in which the questioning of Hale took place was secretive and in addition lacked such minimal safeguards as the presence of public arbiters and a reporter, which were present in *Grunewald*. Even more than Halperin, respondent may well have been intimidated by the setting, or at the very least, he may have preferred to make any statements in more hospitable surroundings, in the presence of an attorney, or in open court. Third, Hale's status as a "potential defendant" was even clearer than Halperin's since Hale had been the subject of eyewitness identification and had been arrested on suspicion of having committed the offense.

The Government nonetheless contends that respondent's silence at the time of his arrest is probative of the falsity of his explanation later proffered at trial because the incentive of immediate release and the opportunity for independent corroboration would have prompted an innocent suspect to explain away the incriminating circumstances. On the facts of this case, we cannot agree. Petitioner here had no reason to think that any explanation he might make would hasten his release. On the contrary, he had substantial indication that nothing he said would influence the police decision to retain him in custody. At the time of his arrest petitioner knew that the case against him was built on seemingly strong evidence—on an identification by the complainant his flight at that time, and his possession of $15. In these circumstances he could not have expected the police to release him merely on the strength of his explanation. Hale's prior contacts with the police and his participation in a narcotics rehabilitation program further diminished the likelihood of his release, irrespective of what he might say. In light of the many alternative explanations for his pretrial silence, we do not think it sufficiently probative of an inconsistency with his in-court testimony to warrant admission.

IV

Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.[7]

As we have stated before: "Where the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *Shepherd v. United States*, 290 U.S. 96, 104 (1930). We now conclude that the respondent's silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact.

Accordingly, we hold that under the circumstances of

[6] "Innocent men are more likely to [remain silent] in secret proceedings where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial truth." *Grunewald v. United States*, 353 U.S., at 422–423.

[7] We recognize that the question whether evidence is sufficiently inconsistent to be sent to the jury on the issue of credibility is ordinarily in the discretion of the trial court. "But, where such evidentiary matters have grave constitutional overtones . . . we feel justified in exercising this Court's supervisory control." *Grunewald v. United States*, 353 U.S., at 423–424.

this case it was prejudicial error for the trial court to permit cross-examination of respondent concerning his silence during police interrogation, and we conclude, in the exercise of our supervisory authority over the lower federal courts, that Hale is entitled to a new trial.

The judgment below is

Affirmed.

MR. JUSTICE BLACKMUN concurs in the result.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I cannot escape the conclusion that this case is something of a tempest-in-a-saucer and the Court rightly avoids placing the result on constitutional grounds. A dubious aspect of the Court's opinion is to renew the dictum of the *Grunewald* opinion, see *ante*, at 7 and n. 6. There the Court casually elevated a fallacy into a general proposition in terms that the innocent "are more likely to [remain silent] in secret proceedings . . . than in open court proceedings . . . ." To begin with, there is not a scintilla of empirical data to support the first generalization nor is it something generally accepted as validated by ordinary human experience. It is no more accurate than to say, for example, that the innocent are the first to protest their innocence than that the guilty do so. There is simply no basis for declaring a generalized probability one way or the other. Second, the *Grunewald* suggestion that people are more likely to speak out "in open court proceedings . . ." has no basis in human experience. A confident, assured person will likely speak out in either place; a timid, insecure person may be more overwhelmed by the formality of "open court proceedings" than by a police station. Moreover, in "open court" if one is an accused, there is a constitutional option to remain totally silent but if an accused takes the stand he must answer all admissible questions. A nonparty witness has less option than the accused since a nonparty witness must take the stand if called. We ought to be wary of casual generalizations that read well but "do not wash."

MR. JUSTICE DOUGLAS, concurring in the judgment.

I agree with the Court that the judgment below should be affirmed, but "I do not, like the Court, rest my conclusion on the special circumstances of this case. I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it." *Grunewald* v. *United States*, 353 U. S. 391, 425 (1957) (concurring opinion). My view of this case is therefore controlled by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). I do not accept the idea that *Miranda* loses its force in the impeachment context. See *Harris* v. *New York*, 401 U. S. 222 (1971). In my opinion *Miranda* should be given full effect.

I also believe, as does my Brother WHITE, that given the existence of *Miranda* due process is violated when the prosecution calls attention to the silence of the accused at the time of arrest.

MR. JUSTICE WHITE, concurring in the judgment.

I am no more enthusastic about *Miranda* v. *Arizona*, 384 U. S. 436 (1966), now than I was when that decision was announced. But when a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. Cf. *Johnson* v. *United States*, 318 U. S. 189, 196–199 (1943). Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case. I would affirm on this ground.

ANDREW L. FREY, Deputy Solicitor General (ROBERT H. BORK, Solicitor General, JOHN C. KEENEY, Acting Assistant Attorney General, ROBERT B. REICH, Assistant to the Solicitor General, JEROME M. FEIT and IVAN MICHAEL SCHAEFFER, Justice Dept. attorneys, with him on the brief) for petitioner; LARRY J. RITCHIE, Washington, D.C. for respondent.

No. 73-1942

Richard Erznoznik, etc., Appellant, v. City of Jacksonville. | **On Appeal from the District Court of Appeal of Florida for the First District.**

[June 23, 1975]

Syllabus

A Jacksonville, Fla., ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place, is facially invalid as an infringement of First Amendment rights.

(a) The ordinance by discriminating among movies solely on the basis of content has the effect of deterring drive-in theaters from showing movies containing any nudity, however innocent or even educational, and such censorship of the content of otherwise protected speech cannot be justified on the basis of the limited privacy interest of persons on the public streets, who if offended by viewing the movies can readily avert their eyes.

(b) Nor can the ordinance be justified as an exercise of the city's police power for the protection of children against viewing the films. Even assuming that such is its purpose, the restriction is broader than permissible since it is not directed against sexually explicit nudity or otherwise limited.

(c) Nor can the ordinance be justified as a traffic regulation. If this were its purpose, it would be invalid as a strikingly under-